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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

JOHN E. MANFREDONIA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated New York, June 21, 1972

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IN THE

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—against—

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, John E. Manfredonia, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 26, 1972.

Opinion Below

The opinion of the Circuit Court of Appeals, as yet unreported, is printed as Appendix A, *infra.*

Jurisdiction

The judgment of the Court of Appeals, Appendix B, *infra*, was dated and entered on May 26, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and Supreme Court Rule 22 (2).

Questions Presented

1. Does petitioner, a person on probation from a Federal perjury conviction, have a Fifth Amendment privilege to refuse to answer incriminatory questions on a probation report?

2. Did evidentiary errors committed by the District Court deprive petitioner of a fair revocation hearing in contravention of the due process requirements of the Fifth Amendment?

3. Is the incarceration of petitioner for violating probation by failing to answer questions which he was mentally unable to answer violative of his Eighth Amendment Rights?

Constitutional and Statutory Provisions and Regulations Involved

Questions 1 and 2 involves the Fifth Amendment of the United States Constitution and 18 U.S.C. §3651 which are set forth in Appendix E at p. 17a, *infra*.

Question 3 involves the Eighth Amendment of the United States Constitution and 18 U.S.C. §3651 which are set forth in Appendix E, p. 17a, *infra*.

Statement of the Case

John E. Manfredonia, petitioner, was indicted in the United States Federal District Court for the Southern District of New York, in 1967 for violation of the federal wagering tax act, 26 U.S.C. §§4401, 4411, 7202 and 7263. He was convicted after a jury trial in which the main prosecution witness was an I.R.S. agent, one Gerald Peden. At that trial, petitioner testified in his own defense.

On appeal, the conviction was reversed* and the indictment dismissed under the Supreme Court decisions in *United States* v. *Marchetti,* (1968) 390 U. S. 39 and *United States* v. *Grosso,* (1968) 390 U. S. 62.

However, for his testimony at the wagering tax trial, petitioner was indicted in 1968 for perjury in violation of 18 U.S.C. §1621. At the perjury trial, Peden was, again, the main prosecution witness. Petitioner was convicted on two counts of perjury, fined $2,000, and sentenced to 18 months on one count, and fined another $2,000 and given five years' probation on the other.

Following an unsuccessful appeal to the Court of Appeals for the Second Circuit,** petitioner served his prison term and was released in November, 1970. Thereupon, he commenced his five years of probation.

Subsequent to petitioner's perjury conviction, the I.R.S. agent Peden, was himself indicted in the Southern District of New York Federal Court for attempted bribery of a fellow I.R.S. agent, in a matter not related to peti-

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* *United States* v. *Manfredonia* (C.A. 1, 1968), 391 F. 2d 229.

** *United States* v. *Manfredonia* (C.A. 2, 1969), 414 F. 2d 760.

tioner's case.* Peden was convicted on the charges on May 26, 1972, following trial.

Petitioner's probation was subject to the 1932 probation order of the Southern District Court and to the conditions of the Probation Department, drawn up presumably on the basis of that order.

Petitioner was requested by his then probation officer, Norman Best, to complete and sign monthly questionnaires.** For the first month of probation, December, 1970, petitioner signed one which omitted the answers to two questions concerning his income and his debts and subsequently filed two more incomplete questionnaires for January and February, 1972. Thereafter, being advised by Best that only completed questionnaires were acceptable, he ceased to file them.

Throughout the probation period, petitioner presented himself promptly when requested to do so, was invariably courteous, violated no laws, always sought and received permission to travel out of the state, and at all times kept the office aware of his address and whereabouts.

But petitioner's supervision was shifted to another probation officer, one Harry G. Sydor, and on February 4, 1972, this proceeding was commenced to revoke petitioner's probation.

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* *United States* v. *Peden*, 71 CR. 681 (6-24-71).

** Our position throughout has been that neither the 1932 order nor the probationer conditions call for written or even oral reports. The word "report" as used therein obviously means "to present oneself". The Court appears to have agreed, at least as a matter of caution, by its oral direction to petitioner during the hearing and from the bench, that he complete and sign all reports.

The petition contained three specifications of violation, briefly: (i) petitioner's failure to obtain legitimate employment; (ii) his refusal to file written monthly reports as directed; and, (iii) his failure to attempt to pay his fine.

The defense to the petition was twofold: (i) the assertion of a Fifth Amendment privilege against answering the two financial questions on the questionnaires; and (ii) a psychotic inability to answer those two questions.

The Court accepted written memoranda and oral argument on the question of the 5th Amendment privilege, and noticed for hearing the issue of the petitioner's claimed psychotic condition. The hearing was held on March 6, 1972, and was continued to and completed on March 17th, 1972.

During the course of the hearing the third specification was formally dismissed, the first specification was dropped, and only the second charge remained, namely, petitioner's failure to file the questionnaires which, in substance, amounted to a failure to answer the two financial questions on the form.

At the hearing, the Government's only witness was probation officer, Harry G. Sydor. He testified to petitioner's conceded failure to submit completed, signed monthly reports, and to petitioner's alleged affluent manner of living.

The Government refused to call Dr. Lubin, the psychiatrist appointed by the Court at the Government's own request. Petitioner thereupon called him; and also called Dr. Arnold Zucker, a psychiatrist retained by the defense. Both psychiatrists testified that petitioner was *psychotic* in the matter of his refusal to answer the two questions.

At the close of the hearing, the Court reserved decision and later held, in a 15-page decision (See Appendix C),

that petitioner had no Fifth Amendment privilege against compulsory self-incrimination, rejected *in toto* the psychiatric testimony, revoked probation and sentenced petitioner to six months in prison. The Second Circuit Court of Appeals stayed surrender pending expedited appeal. By opinion dated May 26, 1972, the Second Circuit Court of Appeals affirmed the revocation of probation (See Appendix A). Petitioner was continued on his own recognizance by the Second Circuit Court of Appeals pending the disposition of his Petition for a Writ of Certiorari (See Appendix D).

On Question 1

The two questions on the probation questionnaires to which the privilege was raised are these:

> "Did you receive any money other than from employment, such as loans, relief benefits, etc.? [To be answered yes or no]
>
> If so, give amounts and from whom received."
>
> "Do you have any debts which are past due? [To be answered yes or no]
>
> If so, give amounts and to whom owed."

To these questions, the petitioner has consistently urged his Fifth Amendment privilege. That the privilege is applicable to such proceedings as the administrative processes of the probation department appears reaffirmed by the Court's recent opinion in *Kastigar* v. *United States,* (1972) —— U.S. ——, 40 L. W 4550 at 4551, where Mr. Justice Powell wrote:

> "The privilege reflects a complex of our fundamental values and aspirations, and marks an im-

portant advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."

That the questions were such as to justify invocation of the privilege is evident not only on their face but even more so from various remarks by the Court during the course of the hearing the substance of which is indicated by the following selective example:

> The Court: Probation—and I, after all have been involved in these cases for some time—has observed over the years that he lives in circumstances that are quite agreeable for a man with no income.
>
> His wife works as a waitress and probation, in the exercise of its delicate and important and serious responsibilities, wants to know where the money comes from with respect to a man who has been convicted of perjury and *about whom there are other circumstances which I don't have to credit, which indicate the possibility that not all his sources of income are lawful.*
>
> So it seems to me in the end that it does not matter whether there are eleven questions or thirty-two questions, or just one, where the one happens to be the big question: *where is the money coming from?* (Emphasis added)

Clearly, petitioner's right of refusal is justifiable within the rule of *Hoffman* v. *United States,* (1951), 341 U.S. 479, *Blau* v. *United States,* (1950) 340 U.S. 159, and *Malloy* v. *Hogan* (1964) 378 U.S. 1; that is, it was well-

taken, not a sham, nor an evasion. This is self-evident from the Court's above-quoted remarks about suspected unlawful sources of hidden income.

Thus the issue comes simply to this: has petitioner, a person on probation, a 5th Amendment privilege against compulsory self-incrimination?

This Court and lower Federal Courts have held that probationers have many related constitutional rights: Sixth and Fourteenth Amendment rights to counsel at a revocation proceeding, *Mempha* v. *Rhay* (1967) 389 U.S. 128; *Earnest* v. *Willingham* (10 C.A. 1969), 406 F. 2d 681; Fourth Amendment rights against unreasonable search and seizure, *United States* v. *Hines* (10 C.A. 1969) 419 F. 2d 173; *Brown* v. *Kearney* (5 C.A. 1966), 355 F. 2d 199; *Martin* v. *United States* (4 C.A. 1959), 183 F. 2d 436, 439; First Amendment rights to address public gatherings without advance permission (*Hyand* v. *Protunier* (D.C.M.D. Cal. 1970), 311 F. Supp. 749; and an Eighth Amendment right against an order to donate blood, *Springer* v. *United States* (9 C.A. 1945) 148 F. 2d 411.

The 5th Amendment itself is all embrasive. No one, neither prisoner, parolee nor probationer, neither one presumed innocent nor one reputed guilty, is left unprotected. As pointed out in *Kastigar* v. *United States,* supra, the only exclusions and they are not really exceptions in the true sense, are (i) persons granted immunity, so that incrimination is no longer possible; and (ii) persons who have voluntarily and intelligently waived their privilege. Only in such situations is the privilege abrogated. It is not abrogated by imprisonment, see *Clutchette* v. *Procunier,* (D.C.N.Cal. 1971), —— F. Supp. ——, 40 L. W. 203; and it should not be abrogated by probation.

The 'judicial gift' argument, that in imposing a lesser sentence a Court may attach to it even an unconstitutional

condition, has very recently been repudiated. In *Frazier* v. *Jordan* (C.A. 5, April 3, 1972), 11 Cr. L. 2077, a state court had sentenced a defendant to a "$17 fine or 13 days in jail." The federal district court granted habeas corpus discharging the defendant and the Circuit Court affirmed. The ratio decidendi was that the sentence unconstitutionally violated an indigent defendant's right to "equal protection of the law". It mattered not that the state court could, without further ado, have simply imposed the jail sentence.

The "grace" theory of probation, expressed as a dictum in *Escoe* v. *Zerbst* (1935), 295 U.S. at 492-3, has been exploded by *Goldberg* v. *Kelly* (1970), 397 U.S. 254 at 652. See also the opinion of Kaufman, C.J., in *Bey* v. *Board of Parole* (C.A. 2 1971), 9 Cr L 2190, —— F. 2d ——.

Likewise, any argument of implied waiver (there is here no basis for asserting an express waiver) is laid to rest by this Court's holding in *Brady* v. *United States,* (1970) 397 U.S. 742 at 748:

> "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"

The government argument, accepted in the decision below, asserts that the availability of the 5th Amendment privilege to a probationer "would probably spell the end of probation". This is sheer speculation. The case at bar is a first instance; there is no prior experience and no statistics. This type of guesswork resembles the speculation that the *Miranda* rule would utterly hamstring criminal prosecutions See *Miranda* v. *State of Arizona,* (1966) 384 U.S. 436, dissenting opinion, 384 U.S. 504 at 514.

The government argument that the procedure resulting from a probationer's exercise of the constitutional privilege might require so much more time, effort, manpower, and money as to make it too difficult to run the probation department, is not a valid argument for the curtailment of a constitutional privilege. See *Hoffman* v. *United States* (1951) 341 U.S. 479 at 490. In *Earnest* v. *Willingham* (10 C.A. 1969), 406 F. 2d 681 at 684, the Circuit Court recently pointed out that ". . . constitutional mandates may not be sacrificed in the interest of time or procedural difficulties."

In *Marchetti* v. *United States* (1968), 390 U.S. 42, this Court held that the methods of collection of the gambling tax were inconsistent with the limitations of the 5th Amendment and unenforcible against defendants asserting the privilege. So, petitioner here asserts a constitutional invalidity of method, not purpose.

A somewhat similar controversy over *method* has just been resolved in *Morales* v. *Schmidt* (D.C. Wisc. 4/6/72), 11 Cr. L. 2061. There the prison authorities of Wisconsin attempted to censor the amorous correspondence of a prisoner with his paramour, his sister-in-law. The Federal District Court held that whenever a regulation denies a convict a right deemed "fundamental" for other members of society, such as the 1st amendment freedom to correspond, the regulation has no presumption of validity.

In *Washington Post* v. *Kleindienst* (D.C. D.C. 4/5/72), 40 LW 2683, the Court has just ordered the Federal Bureau of Prisons to modify its regulation prohibiting any press interviews with prisoners because the extent to which the regulation went, was an unconstitutional limitation of 1st Amendment freedoms.

On Question 2

(a) The petitioner's condition as established by the testmony.

The testimony offered in support of the petitioner's contention that he was psychologically disabled from completing the written probation reports was that of the Court-ordered psychiatrist, Dr. Martin Lubin, and of a psychiatrist retained by the defense, Dr. Arnold Zucker.

The government after applying for, and having had appointed, a psychiatrist, Dr. Lubin, refused to call him as a witness at the hearing on March 6, 1972.

He was called by the defense and on direct examination he testified as follows:

> "I do think what I came to a conclusion was, I think it's a very complicated case, and he could—and I think that what he's got is a paranoid state.
>
> Q. Do you attribute to that paranoid state his reluctance to sign the probation report?
>
> A. Yes; I think I do."

On examination by the Court (Frankel, D.J.) the doctor testified:

> * * * *So I think that he should be considered,* if you like, *psychotic in relation to the special circumstances that he is here faced with, namely, that he won't sign these items on the questionnaire.* I think that in a way one can even see why he might be unduly suspicious of having to sign, even if he were not involved in shady deals in this recent time, because of the past history and given his kind of personality. (emphasis added)

The second psychiatrist, Dr. Zucker stated his conclusion on direct testimony, as follows:

> Q. As a result of that examination, did you arrive at a conclusion with respect to Mr. Manfredonia?
>
> A. I did form a clinical impression, yes.
>
> Q. You realize that the point at issue here is his refusal or inability, whichever it is, to sign certain probation reports. What opinion did you arrive at with respect to his actions in that respect?
>
> A. Well, my first step was to get some notion of his general personality background and psychotherapy. In my estimation, by his behaviour in the interview situation and his description of the events relating to this matter, I came to a diagnostic impression. I felt that he shows strong paranoid tendencies, which I would diagnose as a personality disorder of the paranoid type.
>
> I feel that in relation to this matter, he appears to have what we would call a fixation, almost a monomania, and I believe this would fit under the clinical category of paranoia, which is a very limited psychotic-like condition.
>
> . . . I would have to, again, define this and elaborate it. It is a minimal and borderline psychotic condition; that is, it is in the borderline between neurosis and a very definite pyschosis. It is not a common type of condition.
>
> * * *
>
> Q. And in that sense a refusal or an inability to answer certain questions on a written report is not a volitional act on his part, is that right?
>
> A. Well, it is consistent with the paranoid and psychotic type of thinking.

On cross-examination the doctor was asked:

> Q. If I were to tell you that the questions which the probation office sought to have answered were the name of Mr. Manfredonia's employer, the nature of his employment, total amount earned from employment during the month, number of days worked during the month if not working or changed jobs, explain why; whether any money was received other than from employment, such as loans, relief, benefits and so forth; if so, give amounts and from whom received; whether the defendant has any debts which are past due, and if so, give the amounts and to whom owed.
>
> If you would think of those questions, is Mr. Manfredonia's paranoia such that he lacks a substantial capacity to understand the wrongfulness of his refusal to answer those questions?

And he responded:

> A. In my opinion, his judgment is impaired in refusing to answer those questions.

The Court also examined the doctor:

> Q. Now, if he faced the alternative of making that report or going to prison for up to five years, is it your judgment that he would be unable to chose the report and effectively comply with the requirement?
>
> A. I don't know and I can't predict with certainty, only probability, how he would actually respond if the choice were there. However, I would say that is a probability that he would go to prison, would not answer the report.

(b) The test of responsibility applied by the Court.

Regarding the strict question of mental capacity the Court appeared to allude to an issue of "criminal responsibility" and cited the testimony of the psychiatrists placing emphasis on their testimony that ". . . defendant understands the risk of not filing the reports and the wrongfulness of noncompliance" (See Appendix C at page 10a).

The Court's emphasis reflects the trend suggested by the government's line of questioning when Dr. Zucker was asked:

> *By Mr. Kenney:*
>
> Q. Now, do you have an opinion as to whether he lacks substantial capacity to understand the wrongfulness of his refusal to answer these questions?
>
> A. Yes. Apparently, he is intellectually quite aware of the risk he stands of not answering these questions and apparently he is willing to take the risk.

Furthermore, the Court did not appear to base its decision solely on the basis of the question of capacity but on a further alternative postulation that if petitioner lacks such capacity, then he is in any event, unfit for probation and should be reincarcerated. Thus the Court asked Dr. Zucker:

> "Q. If a judge of this Court were confronted in the case of this defendant, Mr. Manfredonia, as a judge may be, between the choice of sending him to prison and putting him on probation, and if it were, as it is, a condition of probation that a man makes reports, would it be your advice that he is not a suitable candidate for probation?

A. I would question why he doesn't make the—

Q. No. I am asking you, if I ask you your advice, which I am now asking, and it is quite meaningful, because I may in a week or two face this exact question.

A. My advice is that I can't answer that.

Q. You don't know whether he would be a suitable candidate for probation, if a reporting requirement were part of it?

A. I would have to know a good deal more about him, the type of report, his attitudes and more information.

And, similarly, the Court queried Dr. Lubin:

"Q. Suppose it is or were a condition of probation that you make reports on your activities, and that if you are incapable of doing that, you cannot be put on probation, would it be your judgment, based on the examination of this man, that he would not be capable of being put on probation because he could not make those reports?

A. I don't know that he can't put his hand to paper and fill those things out. Like it would be physically impossible for him. Obviously, it wouldn't I don't know, you know, in the punch, whether he might not put his hands to the—fill out the forms before going to jail, I mean, to return to jail rather than not fill out the form. I don't know that."

(c) The Court's determination.

The Court wrote a lengthy opinion revoking probation which summarized the psychiatric characterizations but concluded:

> Considering both the characterizations the doctors gave and underlying reports from defendant upon which the characterizations were based, and setting these in the context of the record as a whole, the court finds that this defendant's 'disorder' is no greater than the fears, obsessions and resistances of individuals regularly found sane and held responsible for their misdeeds. Skirting metaphysics, the court find him capable of effective choice.

(See Appendix C at p. 10a).

The Court further elucidated the basis for its ruling at the hearing on April 7, 1972:

> "First, as the trier of fact, understanding my function, *I reject it in toto,* the claim of any kind of psychiatric inability of a nature sufficient to justify the non-compliance with this reporting requirement.
>
> "I rejected that and meant to, and I hope the opinion is lucid enough to make this clear with respect to this defense as presented against the answering of that whole batch of questions.
>
> "It seems to me on balance, with all deference to these able doctors, that the contention that he was incapable of answering in some sense was not credible.
>
> "Although I am not a psychiatrist, I am commissioned to try the facts in various kinds of disputes, including facts which relate to psychiatric problems." (Emphasis added.)

The Court based its decision not on the appellant's ability to conform his acts to the asserted requirement,

but on the appellant's capacity to understand the wrongfulness vel non of his acts.

(d) The error of the Court's factual determination.

It is evident from both the testimony of the psychiatrists, as well as the legal authorities studied, that as respects criminal responsibility, "insanity" is a mere short hand term encompassing a spectrum of mental disorders, diseases and defects of greater and lesser degrees. See *United States* v. *Henry* (2nd Cir. 1969), 417 F. 2d 267, at footnote 1. As defined by BLACK'S LAW DICTIONARY, 4th Ed. under "Other Forms of Insanity":

> "*Monomania.* A perversion of the understanding in regard to a single object or a small number of objects, with predominance of mental excitement. . . ." (id., at p. 434)
>
> "*Paranoia.* Monomania in general, or the obsession of a delusion or system of delusions which dominate without destroying the mental capacity, leaving the patient sane as to all matters outside their particular range, though subject to perverted ideas, false beliefs, and uncontrollable impulses within that range. . . ." (id., at p. 934)

And *Psychosis* is defined in Black as:

> "A disease of the mind; especially a functional mental disorder, that is, one unattended with structural changes in the brain." (id., at p. 1392)

As stated by *McDonald* v. *United States* (D. C. Cir. 1962), 312 F. 2d 847 at 851, and quoted from *United States* v. *Freeman* (2nd Cir. 1966), 357 F. 2d 606, 622 at footnote 51:

> ". . . 'it is very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect.' To reinforce its decision, the Court redefined mental disease or defect to include 'any abnormal condition of the mind which *substantially* affects mental or emotional processes and substantially impairs behavior controls.' . . . it thus adopted a formulation which closely approximates the recommendation of the American Law Institute in its Model Penal Code."

As stated in *Heard* v. *United States* (D. C. Cir., 1965), 348 F. 2d 43 at 45:

> ". . . the expert's label is relatively unimportant but that his description and explanation of capacity to control behavior are critical."

Yet the Court repeatedly stressed the limited functions affected by the petitioner's mental condition, as the Court's basis for determining its non-existence. So the Court said:

> "Thus it has appeared from the outset of the instant revocation proceeding that we were not dealing with a claim of literal mental or emotional 'incapacity' to make the reports, but with an asserted resistance or 'block' of imposing dimensions.
>
> "While that might conceivably have ended the subject adversely to defendant. . . ."

And in footnote 5 of the opinion (See Appendix C at page 11a) the Court said:

> "It is hard for even a lay judge to envision a 'paranoid state' or 'monomania' so neatly tailored (or

alterable) to so narrow an area of sensitivity. The psychic problem is said to center upon a paranoid fear that government people will distort reports defendant might supply. The fear of distortion, if it exists in anything like the claimed measure, would surely cover equally reports about employment and reports about other income. There are, in short, limits to the credulity with which courts may be expected to receive psycholegal constructs like that now proposed"

In support of petitioner's motion for reconsideration Dr. Zucker in an affidavit addressed himself to the above quoted footnote comment of the Court. Dr. Zucker stated:

"7. In my judgment as a psychiatrist, there is no inconsistency in Mr. Manfredonia being willing to answer certain questions on the probation report which he considers 'harmless' and my finding that he is in a limited psychotic state respecting other questions which he considers 'dangerous' and which he believes will be wrongfully used against him, and which he refuses to answer. This position is the position I understood the patient to take when I examined him and is no 'revision of position' on my part. The real, but limited, delusion ('monomania') which in my opinion he has, does not, and need not extend to all the questions on the questionnaire; it need not 'cover equally reports about employment and reports about other income.' This condition which the Court characterizes as an incredible 'psycholegal construct' is a common phenomenon in this type of disorder, that is, in paranoia. I have observed it in others who have come under my observation and care.

8. I wish to amplify the basis for my diagnosis of the patient, John E. Manfredonia, as that of Paranoia. The current edition (Second Edition) of the American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders defines Paranoia (297.0) as:

> '• • • a condition characterized by gradual development of an intricate, complex, and elaborate paranoid system based on and often proceeding logically from misinterpretation of an actual event • • • In spite of a chronic course the condition does not seem to interfere with the rest of the patient's thinking and personality.'

9. In an elaboration of this definition, Norman Cameron, M.D., Prof. of Psychiatry at Yale University School of Medicine, states: (American Handbook of Psychiatry, pp. 526-527)

> 'A patient with severe paranoia may be able to go about the ordinary business of life in spite of maintaining a complex, fixed system of delusion, and without evidence of general disorganization and desocialization.'
>
> 'The clinical picture of paranoia often reflects strength and superior intelligence. But the strength is one of rigidity, as well as organization, and the intelligence is usually pre-empted by a unique irrational belief based upon unsound principles. Experiences which might lead to reality testing and reorientation in a nonparanoid person are treated as nonexistent or beneath contempt.'

10. The defendant, John E. Manfredonia, perceives open-ended, ambiguous (e.g. questions with 'etc.'),

'self-incriminating' questions as danger 'signals', motivated by the government's attempt to 'trap' him and 'get' him.

11. To the degree he perceives a question as 'harmless' or 'non-incriminating' (name, address, a statement that he is unemployed), to that degree it would not enter the delusional system, and he would be free to respond to it. This differentiation, as applied to the probation form in question, is entirely consistent with clinical diagnosis of Paranoia."

Therefore, the Court erred grieviously in rejecting the evidence and in proscribing the defense because as he said, the petitioner's condition was "so neatly tailored."

(e) The Court applied the wrong test of Responsibility.

There are currently two legal definitions respecting "sanity" as a defense to criminal responsibility. The first of these is that established by *M'Naghten's Case,* House of Lords (1843), 10 Cl. & F. 200, 8 Eng. Rep. 718, where, in the language of the Court, the determination was:

> ". . . whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act."

The above is the test apparently emphasized by the government in its cross-examination (see supra at (b)), and taken as determinative by the Court (see supra at (c)).

The second test is that of the American Law Institute's MODEL PERSONAL CODE, §4.01 which provides:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental

> disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

This Court appears not to have spoken on the distinction between the two tests except to imply approval of a modified *M'Naghten* test, *Davis* v. *United States* (1895), 160 U. S. 469. However, it has been accepted by most Federal jurisdictions that the latter test is either completely or in some modified form is the proper one, *United States* v. *Freeman* (2nd Cir., 1966), 357 F. 2d 606; *United States* v. *Currens* (3rd Cir., 1961), 290 F. 2d 751; *United States* v. *Chandler* (4th Cir., 1968), 393 F. 2d 920; *Carter* v. *United States* (5th Cir., 1963), 325 F. 2d 697 and *Blake* v. *United States* (5th Cir., 1969), 407 F. 2d 908; *United States* v. *Smith* (6th Cir., 1968), 404 F. 2d 720; *United States* v. *Shapiro* (7th Cir., 1967), 383 F. 2d 680; *Pope* v. *United States* (8th Cir., 1967), 372 F. 2d 710; *Wion* v. *United States* (10th Cir., 1963), 325 F. 2d 420; *McDonald* v. *United States* (C. A. D. C. 1962), 312 F. 2d 847. Only the Ninth Circuit persisted in resisting the change. *Sauer* v. *United States* (9th Cir., 1957), 241 F. 2d 640; *Romer* v. *United States* (9th Cir., 1968), 390 F. 2d 564; *Johnson* v. *United States* (9th Cir., 1969), 406 F. 2d 1111. But now that circuit, too, has adopted the ALT test. *Wade* v. *United States* (9th Cir., 1970), 426 F. 2d 64.

(f) The evidentiary errors of the Court's determination.

There is in Federal Courts a presumption that "based upon the common experience of mankind . . . every man is sane" (*Davis* v. *United States* (1895), 160 U. S. 469 at 479). In fact, as that case explains, this presumption derives from *M'Naghten's* Case, supra. But the presumption is rebuttable and upon the introduction of evi-

dence of a mental condition respecting criminal responsibility the presumption is overcome, and the burden of persuasion then shifts to the government to prove the element of sanity. As stated by the Supreme Court in a subsequent consideration of *Davis,* supra:

> ". . . while it was true that every man is presumed to be sane, yet whenever, by the testimony, the question of insanity is raised, then the fact of sanity, as any other essential fact in the case must be established to the satisfaction of the jury beyond a reasonable doubt." (*Davis* v. *United States* (1897), 165 U. S. 373 at 378).

This evidentiary principle has been repeatedly reaffirmed by the Supreme Court, *Hotema* v. *United States* (1902), 186 U. S. 413; *Matheson* v. *United States* (1912), 227 U. S. 540; *Leland* v. *State of Oregon* (1952), 343 U. S. 790; see also, *United States* v. *Matos,* (C. A. 2, 1969), 409 F. 2d 1245.

And while rebutting the presumption shifts the burden of persuasion, the burden of proof remains the same. Thus, in the strictly criminal arena, it remains for the people to prove sanity beyond a reasonable doubt. See *Davis* v. *United States* (1895), 165 U. S. 373, 378. However there is authority for the proposition that the burden of proof in a probation revocation hearing differs from that in a criminal trial. See *United States* v. *Nogelberg* (2 C. A., 1969), 413 F. 2d 708; *United States* v. *Ball* (4 C. A., 1966), 358 F. 2d 367; *Yates* v. *United States* (10 C. A., 1962), 308 F. 2d 737; *Manning* v. *United States* (5 C. A., 1947), 161 F. 2d 827. Yet, in view of the discussion below of the question of the nature and quantum of the evidence, the problem of what exactly was the burden of proof does not arise except to the ex-

tent that there was and is, necessarily, some degree of proof that must be reached by the government.

The Court in *Dusky* v. *United States* (8th Cir., 1961), 295 F. 2d 743 at 754, discussing the question of the burden of persuasion stated:

> "It has been said, too, that the nature and quantum of the evidence which the government must produce to meet its burden so as to justify the submission of the insanity issue to the jury varies with the nature and quantum of the evidence indicating mental illness. Thus, it would seem that only slight evidence presented by the defense may be met by a comparatively small amount of evidence presented by the prosecution . . . (cites omitted). . . ."

As that case and others before it pointed out, "any attempt to formulate a quantitative measure" either as to the amount or quality of the evidence needed to raise the issue of "sanity" or the amount or quality of evidence needed on the government's part to overcome it, will produce no more than "illusory definiteness" (id., at 755).

In this case since all the testimony offered established "insanity" and no evidence was introduced to the contrary. The government not only failed its burden of persuasion but never even undertook such a burden. Likewise, because the government never undertook the obligation of meeting its burden of persuasion, it never met the applicable burden of proof, whether beyond a reasonable doubt or any lesser degree.

The issue of sanity was clearly raised with the testimony of the two psychiatrists that petitioner's monomania, paranoia or bordenline psychosis, caused an im-

pairment of judgment such that his refusal to answer the two questions was not volitional, that he was unable to conform his conduct to the requirements of law. This was not a vague claim of irresponsibility, confusion or claimed memory lapses. See *United States* v. *Currier* (2nd Cir., 1969), 405 F. 2d 1039. Nor was this a case where testimony was offered by both sides as to "insanity" and "sanity", thus posing a fact question to be determined by the trier of facts. See *Blake* v. *United States* (5th Cir., 1969), 407 F. 2d 908; *United States* v. *Matos* (2nd Cir., 1969), 409 F. 2d 1245. Rather this was a case where in rebuttal, the government offered no testimony, lay, expert or otherwise, regarding petitioner's sanity, *Gordon* v. *United States* (5th Cir., 1971), 438 F. 2d 858, nor did it in any way undermine that offered by the defense, *Hartford* v. *United States* (9th Cir., 1966), 362 F. 2d 63; *United States* v. *Westerhausen* (7th Cir., 1960), 283 F. 2d 844, except to the possible extent that the government and Court's inquiry established that under the outdated M'Naghten rule, petitioner was not "insane", *United States* v. *White* (9th Cir., 1971), 447 F. 2d 1971. Thus, the Court had no basis for ruling as it did as a trier of fact; the evidence of "insanity" was unchallenged and overwhelming; and as a matter of law established the defense.

The singular effect of each of these evidentiary errors, and certainly their composite result, was to deny petitioner a fair hearing and to negate the constitutionally guaranteed right to 'due process'. The determination of the District Court as affirmed by the judgment of the Court of Appeals should not be permitted to stand. See *Hartford* v. *United States,* supra; *Gordon* v. *United States,* supra; *United States* v. *White,* supra.

On Question 3

The District Court, as evidenced by its questions to the expert witnesses (supra, p. ——) and by its decision, ruel in part or alternatively that if petitioner were mentally incapable of providing signed answers to the two questions, then he would be unsuitable for probation and should be re-incarcerated. So the District Court said (See Appendix C at p. 12a):

> "The reports about basic activities comprise an indispensable tool for effective probation supervision. A defendant 'unable' to meet such a basic requirement of probation—at least if he is otherwise competent, as this defendant is, to be sentenced—should probably be held unsuitable for that mode of correctional treatment. Cf. State v. Oyler, 436 P. 2d 709 (Idaho 1968); Sobota v. Williard, 427 P. 2d 758 (Ore. 1967) (en banc)."

We must conclude from that and from the Court's footnote 6 (*id.* at p. 12a), that the Court found the furnishing of monthly written reports to be "fundamental to a proper probation". *State* v. *Oyler,* 436 P. 2d 709 at 713 (Idaho, 1968).

This Court should take note of several facts: first, in originally sentencing the petitioner to probation, it must be assumed that the Court determined him otherwise suitable for such treatment; second, since his release on probation, the petitioner has neither manifested any antisocial tendencies nor engaged in any criminal activities which would lessen that suitability; lastly, it was not evident then, or later when the petitioner signed the conditions of probation that one of those conditions would be the signing of written answers to the questions which are the subject of our objections. In reality, it was not

until the hearing was in progress and the District Court in the midst of it unequivocally ordered petitioner to complete and sign those reports, that the government had a viable basis for proceeding. In effect, the Court then amended the conditions of probation, so as to inject therein a condition which the Court had reason to believe could not be met.

However, whether the condition requiring signed reports was embodied in the original order or injected after notice of petitioner's psychosis, the incarceration of the petitioner on the basis of his inability to carry out the condition constitutes a violation of the Eighth Amendment's proscription against cruel and unusual punishment.

This Court, in *Robinson* v. *State of California* (1962), 370 U. S. 660, reversed a conviction under a statute which, in that case made a criminal offense of a "chronic condition", narcotics addiction. The Court, at 370 U. S. 666, said:

> "It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be affected with a veneral disease . . . But, in the light of contemporary knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. See State of Louisiana ex rel. Francis v. Resweber, 329 U. S. 459, 67 S. Ct. 374, 91 L. Ed. 422."

Robinson has now been applied to reverse the conviction of a chronic alcoholic for public drunkenness, *Easter* v. *District of Columbia* (D. C. Cir., 1966 en banc), 361 F.

2d 50; and has been suggested, given the proper record, as a basis for defense against narcotics charges other than addition. *Watson* v. *United States* (D. C. Cir., 1970, en banc), 439 F. 2d 442.

Likewise, *Robinson,* supra, has been extended by lower courts to prevent prosecution of a chronic alcoholic for ". . . those acts on his part which are compulsive as symptomatic of the disease." *Driver* v. *Hinnant* (4th Cir., 1966), 356 F. 2d 761 at 764.

Most in point is *Sweeney* v. *United States* (7th Cir., 1965), 353 F. 2d 10, where probation had been revoked for violating a condition of probation that defendant ". . . refrain from the use of alcoholic beverages in any form and . . . support his children to the best of his ability." (353 F. 2d at 11).

The Court said, in reliance on *Robinson,* supra:

> "We think consequently the probation condition under the facts of this case, would be unreasonable as impossible, if psychiatric or other expert testimony was to establish that petitioner's alcoholism has destroyed his power of volition and prevented his compliance with the condition." (353 F. 2d at 11).

The major criticism aimed at the use which defendants have sought to make of *Robinson,* supra, revolves around the attempted equation of narcotics addition and chronic alcoholism with "insanity". See *Castle* v. *United States* (D. C. Cir., 1965), 347 F. 2d 492, concurring opinion of Burger, J. at 347 F. 2d at 495; *Powell* v. *State of Texas* (1968), 392 U. S. 514, 88 S. Ct. 2145.

It is highly questionable whether such criticism is meaningful where the condition causing the asserted violation

is itself a form of "insanity" as here, and where it is not the situation where an accused has committed some act or engaged in some behavior which society has an interest in preventing. See, *Powell*, supra, 392 U. S. at 533. Notwithstanding such criticism, the record in this case may suggest a further extension of *Robinson*. See *Budd* v. *Madigan* (9th Cir., 1969), 418 F. 2d 1032; *Powell*, supra, the opinion of Mr. Justice White at 392 U. S. 552; *Watson* v. *United States*, supra.

The District Court's determination to incarcerate the petitioner if he suffers from mental condition on the ground that such mental condition makes him unsuitable for probation is tantamount to punishing petitioner for having a mental disease, and is violative of the Eighth Amendment. See *United States ex rel. von Wolfersdorf* v. *Johnston* (D. C., S. D. N. Y., 1970), 317 F. Supp. 66.

It is respectfully suggested that this case raises squarely a point which this Court, in *Robinson*, thought unlikely.

> "It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill . . ." [*Robinson*, supra, 370 U. S. at 666]

Ten years later, the Court below directs that petitioner be incarcerated for an act which the testimony establishes is the direct product of a mental illness. It seems axiomatic that to punish one for the manifestations is to punish one for the very disease which caused the manifestations and to do that is constitutionally impermissible.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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New York, New York 10038
Telephone: (212) 962-5442

On the Petition:

WILLIAM T. GRIFFIN
PETER GRIFFIN

Dated: June 14, 1972

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 850—September Term, 1971.

(Argued May 26, 1972 Decided May 26, 1972.)

Docket No. 72-1403

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN E. MANFREDONIA,

Defendant-Appellant.

Before:

LEVENTHAL,* FEINBERG and MULLIGAN,

Circuit Judges.

Appeal from order of United States District Court for the Southern District of New York, Marvin E. Frankel, *J.*, revoking probation for failure to submit written monthly reports to Probation Office.

Affirmed.

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* Of the United States Circuit Court for the District of Columbia, sitting by designation.

Appendix A

WILLIAM T. GRIFFIN, New York, N. Y. (Peter Griffin, on the brief), *for Appellant.*

JOHN J. KENNEY, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; Peter F. Rient, Assistant United States Attorney, on the brief), *for Appellee.*

PER CURIAM:

The judgment of the District Court is affirmed on the opinion of Judge Frankel, reported at —— F. Supp. —— (S. D. N. Y. 1972).

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of May, one thousand nine hundred and seventy-two.

Present:

HON. HAROLD LEVENTHAL,
HON. WILFRED FEINBERG,
HON. WILLIAM HUGHES MULLIGAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN E. MANFREDONIA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARI
Clerk

APPENDIX C

Opinion

UNITED STATES DIETRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

JOHN E. MANFREDONIA,

Defendant.

68 Cr. 424

Appearances:

Hon. Whitney North Seymour, Jr., United States Attorney for the Southern District of New York
Attorney for United States of America

John J. Kenney, Esq.
Assistant United States Attorney
Of Counsel

William T. Griffin, Esq.
New York, New York
Attorney for Defendant

James J. Doyle, Esq.
Peter Griffin, Esq.
Of Counsel

Appendix C

FRANKEL, D.J.

Defendant was convicted by a jury on two perjury counts. On November 18, 1968, he was sentenced to a prison term of 18 months and fined $2,000 on the first count. Imposition of prison sentence was suspended on count two, defendant was fined an additional $2,000, and he was placed on probation for a period of five years to commence after service of the prison term on count one. He surrendered for confinement on October 10, 1969, having prosecuted an unsuccessful appeal. His term, reduced by appropriate credits, expired on November 25, 1970, when he was released and his period of probation began.

The Probation Office has now charged defendant with violating the conditions of his probation in three respects:

> "[1] That he has failed to obtain any type of legitimate employment.
>
> "[2] That he has refused to submit his written monthly reports as directed.
>
> "[3] That he has made no effort to pay his fine."

The second of these specifications, which is critical in the court's appraisal of the problems presented, has given rise to some factual concerns hereinafter discussed.[1] For

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[1] The conditions of defendant's probation, accepted and signed by him, required *inter alia* that he "report at such times and places as the Probation Officer shall direct." In a prehearing memorandum of law, the defendant's counsel mentioned as a "hypertechnicality" the suggestion that this requirement does not extend to

(Footnote continued on following page)

the rest, however, the facts causing the charges of probation violation are essentially undisputed. Thus, it is agreed that defendant has not obtained legitimate gainful employment. It is undisputed that his fine remains unsatisfied except for the following installments paid at the times indicated:

December 23, 1968	$20.00
January 27, 1969	10.00
March 27, 1969	20.00

(*Footnote continued from preceding page*)

written, signed "reports," but merely directs the probationer to "appear" at designated times and places. Thereafter, at our hearing, defense counsel made clear that, hypertechnicality or no, this contention was being pressed. The earlier characterization was more sound. In the context of the probation status and our general conditions as steadily construed over the years, the reporting requirement means precisely that the person on probation will give an account of himself, either written or oral, as well as appearing when he may reasonably be required to do so. Cf. R. Dawson, Sentencing: The Decision as to Type, Length, and Conditions of Sentence 102-04, 132-33 & n. 106 (1969); P. Tappen, Crime, Justice and Correction 567, 569-70 (1960); United States Probation Officers Manual, ch. 8, pt. 8.12 (June 4, 1971) ("Monthly Supervision Reports").

In any event, it has not been disputed, nor is it disputable, that the court "may revoke or modify any condition of probation" during the period thereof. 18 U.S.C. §3651. Accordingly, to obviate any possible question on this score, the court on March 6, 1972, expressly ordered defendant to comply with the written report requirement that our Probation Office has demanded in his case, as in the majority of others in this District. It is now undisputed that the defendant continues to fail to meet the requirement, so that the issues hereinafter discussed are clearly and indubitably presented.

Appendix C

April 22, 1969	10.00
May 23, 1969	10.00
July 17, 1969	20.00
September 3, 1969	10.00
October 2, 1969	6.05

Most importantly, it is acknowledged that defendant has failed to submit required monthly reports giving such information as: name of employer, if any, nature of employment, earnings from employment, time worked, receipts from loans, welfare benefits, and other sources, overdue debts, if any, and the identity of creditors.[2]

---

[2] Since he was placed on probation in November 1970, defendant has filed only three of the required monthly reports. These were for December 1970, January 1971, and March 1971. In the first report, defendant gave his address and telephone number, indicated that he had not moved during the month and that he was unemployed, and signed and dated the report. In the January 1971 report, defendant again listed his address and telephone number, indicated that he had not moved, and signed and dated the paper. The March 1971 report was left blank except for defendant's signature and the date.

The report in question here is the Federal Probation and Parole Form No. 8, the "Monthly Supervision Report," which "is used for all persons under supervision." United States Probation Officers Manual, ch. 8, pt. 8.12 A (June 4, 1971). This form requires the probationer to supply the following information:

"Did you move during the month?
"If you have moved, explain why
"Name and address of your employer
"What is your job?

(Footnote continued on following page)

Appendix C

It is defendant's failure and refusal to give information about his financial affairs that generate the relatively interesting questions now before the court. Defendant seeks to justify this omission upon a factual assertion plus an alternative ground of law. The factual contention is that having been convicted of perjury, and retaining an unshaken knowledge of his innocence, defendant now has a "deep obsession and phobia * * * that any prospective employer, or any other person, with whom he becomes connected will be harassed and his answers will be distorted and twisted and used as the framework of future

---

(Footnote continued from preceding page)

"Have you changed jobs during the month?
"What was the total amount you earned from employment during the month?
"How many days did you work during the month?
"If you are not working, explain why
"Did you receive any money other than from employment, such as loans, relief benefits, etc.?
"If so, give amounts and from whom received
"Do you have any debts which are past due?
"If so, give amounts and to whom owed?
"Were you arrested during the month?
"If so, give date of arrest Place of arrest
"With what offense were you charged?
"Disposition made (fine, jail, dismissed, etc.)
"Remarks, including explanation of arrests, if any."

At a hearing on March 6, 1972, defense counsel argued that the questions relating to debts past due and sources of income other than employment sought to "search a rather long stretch of the past life of the probationer." (Tr. 19.) To erase any possible ambiguity on that point, the court ruled that the questions pertained only to events since the defendant was placed on probation.

charges of perjury."[3] The legal contention is that the reports in question may be withheld upon the basis of defendant's privilege against self-incrimination. The court has received evidence relating to the first of these contentions and has considered the arguments presented on both. Both are now rejected.

1. Concerning the asserted "obsession and phobia," it is appropriate to note the restricted character of this theory on defendant's own submissions. Defense counsel denies any "suggestion * * * that the phobia even approaches insanity * * *. Nor is there any basis to think that the probationer does not understand the consequences of his acts or is unable to assist in the defense of his position."[4] Thus it has appeared from the outset of the instant revocation proceeding that we were not dealing with a claim of literal mental or emotional "incapacity" to make the reports, but with an asserted resistance or "block" of imposing dimensions.

While that might conceivably have ended the subject adversely to defendant, the court heard the testimony of two psychiatrists who had conducted individual examinations of defendant. The two witnesses presented essentially similar descriptions. Defendant, both of them noted, feels that he is being followed, that government agents

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[3] Memorandum of Law 5.

[4] Reply Memorandum 4. The quoted statements were made in the course of opposing a government application to have defendant committed for examination in this revocation proceeding under 18 U.S.C. §4244. Defendant's persuasive showing that the commitment should not be ordered is not confined in its utility to that purpose. It seems fair to consider it as well in defining the ultimate issues presented for decision.

are out to "get" him. He sees evidence of plots and conspiracies against him in the smiles and gestures of court personnel and secretaries. His beliefs on these matters were thought by both psychiatrists to be, at least in some degree, delusional in nature. But both psychiatrists avoided labelling defendant as "psychotic," and stressed the restricted character of his disorder. Thus, defendant was variously described as suffering from a "monomania," as being in a "paranoid state," as being on the borderline between psychosis and neurosis, as having a personality disorder of a paranoid type. His "delusions," to the extent they are delusions and actually believed in, are limited to the specific area of belief in government persecution, and do not impair his ability to function in other areas of life.

On the critical issue of criminal responsibility, one of the psychiatrists said he was uncertain whether a mental disease or defect rendered defendant incapable of supplying the information requested on the monthly reports. According to the other psychiatrist, defendant understands the risks of not filing the reports and the wrongfulness of noncompliance, but is suffering from impaired judgment. In each instance, the evaluation was based solely upon an interview, of several hours duration, at which defendant supplied information about his personal history. Both psychiatrists emphasized the tentative nature of their diagnoses.

The net of the psychiatric testimony, so far as it may be thought to help defendant, is at most that certain paranoid and obsessional tendencies (not amounting to a mental disease or defect) have played a role in his refusal to report. Considering both the characterizations the doctors gave and the underlying reports from defendant upon

which the characterizations were based, and setting these in the context of the record as a whole, the court finds that this defendant's "disorder" is no greater than the fears, obsessions and resistances of individuals regularly found sane and held responsible for their misdeeds. Skirting metaphysics, the court finds him capable of effective choice. His reasons for choosing not to report may well have paranoid tints. Nevertheless, he is entirely capable of making the reports in any factual sense that the law can possibly embrace. The court finds his conduct to be a knowing, volitional refusal to report, for which he must face the legal consequences.[5]

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[5] In the course of our hearing defense counsel indicated that defendant's failure or refusal to report might be confined to questions about sources of income other than from employment, and that he would now be willing to give negative answers to questions concerning legitimate employment or income therefrom. This revision of position casts a rather sickly light upon the psychiatric defense: it is hard for even a lay judge to envision a "paranoid state" or "monomania" so neatly tailored (or alterable) to so narrow an area of sensitivity. The psychic problem is said to center upon a paranoid fear that government people will distort reports defendant might supply. The fear of distortion, if it exists in anything like the claimed measure, would surely cover equally reports about employment and reports about other income. There are, in short, limits to the credulity with which courts may be expected to receive psycholegal constructs like that now proposed.

In any event, it is perfectly clear that the charges of violation relate to failures to answer questions on *all* the subjects mentioned earlier—employment, earnings, and the rest—and that this was also true after the court's order of March 6, 1972. Represented by able counsel, defendant had no reason to suppose he could refuse to answer all questions because of privilege as to some. Finally, of course, the decision announced herein is not basically affected by the number of unanswered questions. The claims of privilege and psychosis are not altered by that, and the rejection of the claims rests upon unchanged grounds.

This does not mean defendant would stand on firmer ground now if he could be said to be "incapable" of reporting. The reports about basic activities comprise an indispensable tool for effective probation supervision. A defendant "unable" to meet such a basic requirement of probation—at least if he is otherwise competent, as this defendant is, to be sentenced—should probably be held unsuitable for that mode of correctional treatment. Cf. *State* v. *Oyler*, 436 P. 2d 709 (Idaho 1968); *Sobota* v. *Williard*, 427 P. 2d 758 (Ore. 1967) (en banc).[6]

But that is not in any event the case of our defendant. He is able to comply, but unwilling. His factual "defense" fails.

2. The claim of privilege is not more effective. It is relevant if not dispositive that the vindication of such a claim would probably spell the end of probation. De-

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[6] Few cases have been found which discuss whether or when a psychological incapacity to comply with a probation condition may render an individual ineligible for probation. Those cited above deal with the problem or requiring, as a condition of probation, that a chronic alcoholic refrain from the use of alcoholic beverages—e.g., where the underlying offense is for driving while intoxicated. They support the general proposition, applicable in the instant case, that the court should consider whether compliance with the condition in question is "fundamental to a proper probation." *State* v. *Oyler, supra*, 436 P. 2d at 713. See generally *State* v. *Moretti*, 141 A. 2d 810, 823-26 (N. J. Super. Ct. 1958). It is clear that the sentencing court need not leave a dangerous driver on the highways when it becomes apparent that it is "impossible" for him to avoid the vice rendering him dangerous. On comparable principle, since the program includes supervision and reports as central to the hope for rehabilitation, the probationer who cannot help making supervision unmanageable may fairly be found unfitted for the program.

fendants are left at large rather than locked up on the understanding that they will be subjected to supervision and will cooperate in their supervision. As an alternative to an intolerable regime of surveillance approaching the quality of prison, probations must be, and are, relied upon to supply accounts of their major activities, including their means of earning a living. See D. Dressler, Practice and Theory of Probation and Parole 242-44 (2d ed. 1969); cf. sources cited note 1 *supra*. It is unlikely that Congress would continue to authorize, or that sentencing judges would remain as ready to employ, the alternative of probation if the reporting requirement were held unconstitutional.

There are, however, simpler grounds of law refuting defendant's thesis. To begin with, since our concern is with a sentenced defendant—not actually in custody, but intended to be deprived of full freedom in a variety of fundamental respects[7]—we know that at least some constitutional rights are inevitably limited or withdrawn from such a person during the service of his sentence. The principle, if not the details of application, is essentially the same for a prisoner as for a probationer. Putting it in the enlightened form of its contemporary di-

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[7] The deprivation is real and substantial enough to render habeas corpus a proper avenue of relief for a party claiming invalidity of his sentence to probation. *United States ex rel. B.* v. *Shelley*, 430 F. 2d 215, 218 n. 3 (2d Cir. 1970); *Hahn* v. *Burke*, 430 F. 2d 100, 102 (7th Cir. 1970), cert. denied, 402 U. S. 933 (1971); *Benson* v. *California*, 328 F. 2d 159, 162 (9th Cir. 1964); *Richards* v. *Townsend*, 303 F. Supp. 793, 794 (N. D. Cal. 1969); *Petition of Engle*, 218 F. Supp. 251, 252 (S. D. Ohio 1963), aff'd, 332 F. 2d 88 (6th Cir.), cert. denied, 379 U. S. 903 (1964); cf. *Jones* v. *Cunningham*, 371 U. S. 236 (1963).

mensions, the controlling doctrine here is that a probationer (like a prisoner, parolee or mandatory releasee) "retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944), cert. denied, 225 U. S. 887 (1945). Rights like the freedom to speak, *Nolan* v. *Fitzpatrick*, —— F. 2d —— (1st Cir. 1971) (prisoners); *Sobell* v. *Reed*, 327 F. Supp. 1294 (S. D. N. Y. 1971) (parolees), to pursue legal remedies, *Corby* v. *Conboy*, —— F. 2d —— (2d Cir. 1972) (prisoners), to have counsel, *Gunsolus* v. *Gagnon*, —— F. 2d —— (7th Cir. 1971) (parolees); *People ex rel. Menechino* v. *Warden*, 27 N. Y. 2d 376, 318 N. Y. S. 2d 449 (1971) (Fuld, C.J.) (parolees), and, generally, to the due process of law, *Hyser* v. *Reed*, 318 F. 2d 225 (D. C. Cir.), cert. denied sub nom *Thompson* v. *United States Bd. of Parole*, 375 U. S. 957 (1963), are largely or wholly unimpaired. But the right of privacy must be, at least in some substantial degree, cut down for one who is, "in fact, as well as in theory," under the "custody and control" of the law. *Jones* v. *Cunningham*, 371 U. S. 236, 242 (1963).[8] The requirement to report, to account, is centrally and necessarily implied in the probationer's status. It may not be avoided by the claim of a privilege which must be held unavailable because it is fundamentally inconsistent with the acquisition and maintenance of the probationary status.

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[8] The language quoted is from a case in which the Supreme Court held that a parolee was "in custody" for purposes of federal habeas. The Court's holding is equally applicable to the situation of a probationer. See *United States ex rel. B.* v. *Shelly*, *supra*, 430 F. 2d at 218 n. 3: there is "no reason or authority which would distinguish probation from parole in habeas corpus applications."

Appendix C

It is concluded, in sum, that defendant has violated the conditions of probation. The petition for revocation is, accordingly, granted.[a] The sentence, imposition of which was heretofore suspended, will be imposed at 10 a.m. on April 7, 1972.

It is so ordered.

Dated: New York, New York
March 31, 1972

MARVIN E. FRANKEL
U.S.D.J.

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[a] Having found a violation in the failure to report, the court need not determine whether failure to work or failure to pay the fine would warrant or require revocation. As to the latter, the Government has other remedies not sought in the present proceeding.

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 8th day of June, one thousand nine hundred and seventy-two.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN E. MANFREDONIA,

Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated June 2, 1972, to stay issuance of the mandate and to continue appellant at liberty on his own recognizance pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

It is further ordered that the motion of the United States to issue the mandate forthwith is denied.

WILFRED FEINBERG
WILLIAM H. MULLIGAN
Circuit Judges

APPENDIX E

Constitutional Amendments and Statutes

United States Constitution

AMENDMENT (V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VIII)

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

United States Code

18 U.S.C. § 3651. Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United

States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined to a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

Appendix E

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any person, for whose support he is legally responsible.

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: *Provided,* That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall not notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

As amended Oct. 22, 1970, Publ. L. 91-492, § 1, 84 Stat. 1090.

Certificate of Service

I hereby certify that on this 21st day of June, 1972, three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit were mailed, postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530, as counsel for the United States, the only other party to the appeal.

Dated: New York, N. Y.
June 21st, 1972

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